Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

No. 90-1122

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITIONER'S SUPPLEMENTAL BRIEF

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Jerome Golochowicz
515 Monroe
Detroit, MI 48226
(313) 965-4189

TABLE OF CONTENTS

TABLE OF CONTENTS	i
INDEX OF SUPPLEMENTAL AUTHORITY	i
INDEX OF AUTHORITIES	i
ARGUMENT, QUESTIONS 1, 2 AND 3	1
CONCLUSION	5

INDEX OF SUPPLEMENTAL AUTHORITY

Authority	Page
Shepard v. Rees, 909 F.2d 1234 (9th Cir. 1990)	1,2,3,4

INDEX OF AUTHORITIES

Authority	Page
Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986)	1
Shepard v. Rees, 909 F.2d 1234 (9th Cir. 1990)	1,2,3,4
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1974)	3
Rose v. Clark, 478 U.S. 570 (1986)	4
U.S.S.Ct. Rule 15.7	1
Shepard's Federal Citations, 1989-1990 Supp.	1
Shepard's Federal Citations, Feb. 1991 Supp.	1

PETITIONER'S SUPPLEMENTAL BRIEF

Regarding Issues 1, 2 and 3.

Petitioner has found new authority in support of issues 1, 2 and 3. Petitioner has relied on *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). The Respondent has attempted to distinguish that case. Petitioner has argued that the attempt to distinguish is unconvincing. In any event, the Respondent's attempt to distinguish is rendered wholly ineffective by a recent Ninth Circuit case.

The Ninth Circuit has issued a decision in *Shepard v. Rees*, 909 F.2d 1234 (9th Cir. 1990).[1] This case involved a state court prosecution for murder, which was transformed at the end of trial into a charge of felony murder in the course of a robbery.

---

[1] Some sources mistakenly give this opinion a 1989 date. An opinion in *Sheppard v. Rees* was issued August 25, 1989, at 883 F.2d 795. This opinion was issued and then withdrawn by the Court. Upon a motion for rehearing, the Court issued the amended ruling found at 909 F.2d 1234, on July 6, 1990. Although the 1990 ruling in the *Sheppard* case cites *Givens v. Housewright*, the citation does not appear in the 1989-1990 Supplement of Shepard's Federal Citations. The citation does not appear until the February 1991 supplement to Shepard's Federal Citations, which arrived long after the filing of petition for certiorari in this case. The case was not available when the petition was filed, and therefore is suitable for inclusion in a supplemental brief pursuant to U.S.S.Ct. Rule 15.7.

The Court had no trouble finding this to be reversible constitutional error.

The Court in *Sheppard v. Rees* noted the facts as follows:

> "In an information filed on April 20, 1981, Sheppard was charged with one count of murder under California Penal Code section 187, and with use of a firearm. He was arraigned and pleaded not guilty. The case was tried before a jury on the theory that the killing was premeditated and deliberate, precipitated by an alleged 'debt' from a cocaine transaction Sheppard felt was owed to him by the decedent. At no time during pretrial proceedings, opening statements, or the taking of testimony was the concept of felony-murder raised, directly or indirectly.
> ... [After both sides rested their proofs] the prosecution, for the first time, requested that instruciton on robbery and felony-murder be given in conjunction with those on first-degree murder. Defense counsel immediately objected to the State's request." 909 F.2d at 1235.
> ... "Because neither felony-murder nor the underlying charge of robbery was listed in the information, Sheppard argues he did not receive adequate notice to enable him to prepare a proper defense to the theory of felony-murder." 909 F.2d at 1236.

It is apparent that these facts are indistinguishable from the facts in the instant case.

The Court in *Sheppard v. Rees*, at 1237, held that the lack of notice of felony-murder and the underlying felony was a constitutional error and could not be harmless error:

> "A trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion. *See Strickland v. Washington*, 466 U.S. 668. 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1974) (a fair trial is 'one in which evidence subject to *adversarial testing* is presented to an impartial tribunal *for resolution of issues defined in advance of the proceeding*") (emphasis added). Here, the prosecutor "ambushed" the defense with a new theory of culpability after the evidence was already in, after both sides had rested, and after the jury instructions were settled. This new theory then appeared in the form of unexpected jury instructions permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding.
>
> Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the

> charges against which he or she must defend. Sheppard's counsel had no occasion to defend against the felony-murder theory during the evidentiary phase of the trial. This error affected the composition of the record. *Rose* [*v. Clark*, 478 U.S. 570 (1986)] 478 U.S. at 579, n. 7, 106 S.Ct. at 3107. n. 7. Defense counsel would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at the outset what he was up against.
>
> Thus, it is incorrect to surmise, as did the District Court, that the error was harmless because there was an 'abundance of evidence' to support a finding of felony-murder. The defendant had no opportunity to present his own evidence on felony-murder to refute that of the prosecution."

This excerpt demonstrates that the holdings of the Ninth Circuit in *Sheppard v. Rees* and the Sixth Circuit herein are completely incompatible, and necessarily lead to differing results. The fact that *Sheppard v. Rees* and the instant case have virtually identical facts shows that the issue is one bound to reappear again and again until settled by this Court. Certiorari should therefore be granted.

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the reasons stated in the Petition for Certiorari, as supplemented above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

JAMES STERLING LAWRENCE
(P33664)
Attorney for Petitioner Golochowicz
515 Monroe
Detroit, MI 48226
(313) 965-4189

Dated: April 22, 1991